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IN THE

SUPREME COURT FOR THE UNITED STATES

October Term 1971

No. 71-1468

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

Petitioners,

-vs-

RONALD BRADLEY, et al.,

Respondents.

BRIEF OF RESPONDENTS SCHOOL DISTRICTS* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND ORDERS BELOW

The pertinent orders and opinions of the District Court and the United States Court of Appeals are fully set forth in the Appendix to the Petition For Writ of Certiorari.

JURISDICTION

The Petition For Writ Of Certiorari invokes the jurisdiction of the Court under Section 1291 of Title 28, United States Code.

The undersigned Respondents submit that the Court also may, and should, invoke jurisdiction pursuant to Section 1254 of Title 28, United States Code, which provides, in part, as follows:

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* Respondents school districts include the forty-three (43) intervening school districts in this cause but exclude the defendant Board of Education for the City of Detroit.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of Certiorari granted upon the petition of any party to any civil or criminal case, *before or after* rendition of judgment or decree;" [Emphasis supplied.]

While the undersigned Respondents concur with the contention of Petitioners that all of the questions presented should be determined by this Court as prayed, it is respectfully submitted that the imperative public importance of question number III set forth in the Petition For Writ Of Certiorari provides the basis and urgent need for this Court to exercise its jurisdiction pursuant to Rule 20 of the Supreme Court Rules and Section 2101 (e) of Title 28, United States Code.

Section 2101 (e) of Title 28, United States Code, provides as follows:

"An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

Rule 20 of the Supreme Court Rules states that –

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

QUESTION PRESENTED

Where a single school district has been found to have committed acts of *de jure* segregation, may a court constitutionally issue a desegregation order extending to some eighty-five (85) other independent school districts and requiring massive bussing of children, absent (i) any claim or finding that such other independent school districts have deliberately operated in furtherance of a policy to deny access to or separate pupils in

schools on the basis of race, or, (ii) absent any claim or finding that the boundary lines of such other independent school districts were created or have been maintained with the purpose of creating or fostering a dual school system?[1]

The undersigned Respondents contend that the answer is "NO". The Court of Appeals For The Sixth Circuit did not consider the question.

STATUTORY PROVISIONS INVOLVED

Section 1291 of Title 28, United States Code, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The Statement Of The Case as set forth in the Petition For Writ Of Certiorari is adopted by the undersigned Respondents. In addition, Respondents-Intervenors submit the facts hereinafter recited.

The instant action was commenced on August 18, 1970, by the filing of a complaint which alleged the unconstitutionality of a Michigan statute which was applicable only to the City of Detroit school district and further claimed that plaintiffs' constitutional rights were violated because of the segregated pattern of pupil assignments and the racial identifiability of schools within the City of Detroit school system. The complaint has never been amended and to this date there has been no claim

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[1] Although the undersigned Respondents concur with Questions I and II as presented in the Petition For Writ Of Certiorari their interests are directly affected only to the extent of the constitutional propriety or impropriety of a so-called metropolitan plan of desegregation. Even assuming, *arguendo*, that the City of Detroit school district is not a unitary school system, the question of whether the judicial remedy may extend beyond the nature and locus of the constitutional violation remains.

that any school district other than Detroit has failed to operate a unitary school system.

The complaint, the trial on the merits and the District Court's "Ruling On Issue of Segregation"[2] were directed at and solely concerned with the issue of whether the Detroit school system was operated so as to impair the constitutional rights of the plaintiffs. Accordingly, the undersigned Respondents had no cause or standing to intervene in the proceedings inasmuch as no claim was made against them and no relief was sought which would affect them.

On November 5, 1971, however, the District Court issued an order which adumbrated a dramatic change in the nature of the proceedings. Despite having conducted a trial limited to the issue of unlawful segregation in the Detroit school system and having made findings limited to such issue, the court ordered the State defendants to submit a plan of desegregation which would embrace the entire metropolitan Detroit area. By judicial fiat some eighty-five (85) independent school districts were suddenly faced with the prospect of being subjected to judicial sanction without any claim, trial or finding that they had engaged in any unconstitutional acts. Pursuant to the aforementioned order, on February 4, 1972, a so-called metropolitan plan of desegration was filed with the District Court.

On February 9th, 16th and 17th, respectively, the undersigned Respondents, Grosse Pointe Public Schools, Allen Park Public Schools, et al, Southfield Public Schools and School District for the City of Royal Oak, filed motions to intervene for the purpose of representing their interests and those of the parents and children situate in said school districts.

On March 15, 1972, the District Court issued its order granting said Respondents' motions to intervene as a matter of right, and simultaneously imposed the following conditions designed to circumscribe Respondents' participation in the proceedings.

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[2] Appendix to Petition For Writ Of Certiorari, page 1a.

"1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

"2. No intervenor shall reopen any question or issue which has previously been decided by the court.

"3. The participation of the intervenors considered this day shall be subordinated to that of the original parties and previous intervenors.

"4. The new intervenors shall not initiate discovery proceedings except by permission of the court upon application in writing, accompanied by a showing that no present party plans to or is willing to undertake the particular discovery sought and that the particular matter to be discovered is relevant to the current stage of the proceedings.

"5. No new intervenor shall be permitted to seek a delay of any proceeding in this cause: and he shall be bound by the brief and hearing schedule established by the court's Notice to Counsel, issued March 6, 1972.

"6. New intervenors will not file counterclaims or cross-complaints; nor will they be permitted to seek the joinder of additional parties or the dismissal of present parties, except upon a showing that such action will not result in delay.

"7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Consititution and the prior orders of this court.

"8. New intervenors shall present evidence, if any they have, through witnesses to a number to be set, and limited, if necessary, by the court, following conference.

"9. With regard to the examination of witnesses, all new intervenors shall among themselves select one attorney per witness to act for them, unless one or more of the new intervenors show cause otherwise."

Respondents intervening school districts filed written objections with the District Court against the imposition of such conditions. To date the District Court has made no response to said objections.

Upon being granted right to intervene on March 15, 1972, the District Court advised the Respondents-Intervenors that the Court had previously set March 22, 1972, as the date for filing of briefs on the legal propriety of a metropolitan plan of desegregation and that Respondents-Intervenors thus had one (1) week to present their legal arguments on such issue. On March 24, 1972, two (2) days after the due date for the filing of briefs, the District Court issued a "Ruling On Propriety Of Considering A Metropolitan Remedy To Accomplish Desegregation Of The Public Schools Of The City Of Detroit".[3]

The District Court commenced taking testimony on a metropolitan plan of desegregation at 10:10 a.m. on March 28, 1972. About two hours after Respondents-Intervenors counsel had first appeared in the District Court and before completion of testimony of a single witness, the District Judge announced that all counsel could stop by his office and pick up his Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation.[4] Relying upon inapposite cases where a dual school system was fostered and operated pursuant to state policy, the District Court announced its intention to seek a racial mix by means of a metropolitan plan of desegregation.

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[3] Appendix to Petition For Writ Of Certiorari, page 31a.

[4] Appendix to Petition For Writ Of Certiorari, page 37a.

REASONS FOR GRANTING THE WRIT

A So-Called Metropolitan Plan Of Desegregation Is Constitutionally Improper Absent A Complaint And Finding That Respondents-Intervenors School Districts Have Denied Access To Or Separated Pupils On The Basis Of Race, Or Absent A Finding That The Respondents-Intervenors School Districts Were Created Or Maintained With The Purpose Of Creating Or Fostering A Dual School System.

The instant case is without precedent in terms of the scope of the judicial remedy determined by the District Court, the lack of fundamental due process so far as Respondents-Intervenors are concerned and the absence of any findings against Respondents-Intervenors upon which relief can be predicated.

There are upwards of 600 independent school districts in the State of Michigan. The only complaint ever filed in this action alleges that *one* of those school districts, the City of Detroit, has failed to maintain a unitary school system due to actions of the Detroit Board of Education and certain executive officers of the State. The trial on the merits was confined to the issue of *de jure* segregation in the Detroit school system. The decision of the District Court following a trial on the issues framed by the complaint made no findings of *de jure* segregation with respect to any school district except the City of Detroit.[5]

Despite the fact that there has never been any claim that the undersigned Respondents have failed to maintain a unitary school system, that said Respondents have had no opportunity to be heard on the issue of segregation, that there is not a scintilla, indeed not a tittle, of evidence, that Respondents have denied access to or separated pupils on the basis of race, the District Court has determined that said Respondents are to be subjected to a desegregation plan calling for massive bussing of possibly up to one million children.

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[5] "Ruling On Issue of Segregation", Appendix to Petition For Writ Of Certiorari, page 1a.

The extreme public importance of this case can be gauged by the fact that the number of children affected by the remedy decreed in this action exceeds the respective populations of twelve (12) of the States in this country. The educational future of nearly 1,000,000 children clearly warrants the attention and exercise of jurisdiction by this Court.

Since the public announcement of the District Court's determination to fashion a desegregation plan calling for massive bussing on a scale heretofore unheard of, school districts in the metropolitan Detroit area have been unable to secure voter approval at millage elections and are faced with lack of financial resources necessary to maintain an adequate educational system. Elected school officials cannot plan for the future needs of their students because of the uncertainty as to which students' needs they must meet and the number of students they must accommodate. Expenses connected with the massive bussing program inherent in the District Court's determination will run into the tens of millions of dollars and threaten the continuance of educational programs by already financially hard-pressed educational systems. Planning for future building needs and construction cannot proceed with certainty. Indeed, the assumption by the District Court of the power and authority to ignore and dismantle State-established governmental entities places the continued existence of the school districts in jeopardy.

There is a critical distinction between this case and *Brown* v *Board of Education*, 347 US 483 (1954) and its progeny heretofore considered by this Court. There is no claim or finding in the instant case that the State of Michigan has ever fostered or maintained a dual school system. Over one hundred years ago the Michigan Supreme Court in *Ex Rel Workman* v *Detroit Board of Education*, 18 Mich 399 (1869), declared that under Michigan law black children are placed on the same footing with white children, and admissible on the same terms to all schools.

Where there is no evidence of a state policy of maintaining a dual school system, the naked existence of school districts established along the lines of municipalities, and other govern-

mental entities, does not give rise to a deprivation of constitutional rights. *Spencer* v *Kugler*, 326 F Supp 1235, 1242 (1971); affirmed 404 US 1027 (1972).

The independent school districts in the metropolitan Detroit area, including the Detroit school system, were established pursuant to a State policy of maintaining a unitary school system and the fact that there now exists a racial imbalance in the Detroit school district does not amount to unconstitutional segregation attributable to the establishment or maintenance of the suburban school districts.

In the "Ruling On A Metropolitan Plan" the District Court took cognizance of the lack of precedent for the implementation of such a plan in light of the circumstances here involved, as follows:

> "The main thrust of the objections to the consideration of a metropolitan remedy advanced by intervening school districts is that, absent a finding of acts of segregation on their part, individually, they may not be considered in fashioning a remedy for relief of the plaintiffs. *It must be conceded that the Supreme Court has not yet ruled directly on this issue;* accordingly, we can only proceed by feeling our way through its past decisions with respect to the goal to be achieved in school desegregation cases . . . ."[6] [Emphasis supplied.]

It is respectfully submitted that the welfare of nearly 1,000,000 children should not be jeopardized due to the lack of cogent ruling by this Court and the District Court's "feeling" its way to decision.

Pronouncements of this Court in *Swann* v *Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971) indicate that the District Court has in fact lost its way and only a determination by this Court can provide the needed direction.

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[6] "Ruling On Propriety Of Considering a Metropolitan Remedy To Accomplish Desegregation Of the Public Schools Of The City of Detroit", Appendix to Petition For Writ Of Certiorari, page 34a.

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only on the basis of a constitutional violation*. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. *Judicial authority enters only when local authority defaults.*

"School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. *As with any equity case, the nature of the violation determines the scope of the remedy . . . .*" *Swann, supra*, at page 16. [Emphasis added.]

Here, the only basis of a constitutional violation is the finding of *de jure* segregation in the City of Detroit school district. Local school authority in the eighty-five (85) suburban school districts in the Detroit metropolitan area has not defaulted. The only violation of constitutional rights found by the District Court is the failure of the principal defendants to maintain a unitary school system for approximately 275,000 students *in the City of Detroit*. Yet the judicial remedy authorized by the District Court would relocate hundreds of thousands of children in three counties and up to eighty-five (85) other school districts.

This Court will consider the question of the appropriate scope of a desegregation remedy within a single school district in a non-dual system State when it hears *Keyes* v *School District No. 1, Denver*, 445 F2d 990 (CA 10, 1971), cert granted 404 US 1036 (1972). The case of *Bradley et al v School Board of the City of Richmond*, 338 F Supp 67 (1972), now awaiting deci-

sion in the Court of Appeals for the Fourth Circuit, presents the question of the propriety of cross-district bussing, involving three contiguous school districts, to achieve desegregation where there has been a State-wide dual school system policy. *Bradley* v *Richmond, supra,* will undoubtedly be presented to this Court. Neither of the foregoing cases will, however, reach the issues raised in the instant case.

The Court has previously exercised its power to grant certiorari where the issues presented in other pending cases warranted consideration of all cases at one time. *Taylor* v *McElroy*, 360 US 709 (1959) and *Brown* v *Board of Education of Topeka*, 344 US 1 (1952). The undersigned Respondents suggest that by granting certiorari in this case and hearing the same in conjunction with *Keyes, supra,* and perhaps *Richmond, supra,* the Court will have before it the gamut of desegregation remedies and will be in a position to lay to rest the principal issues associated with the appropriate scope of judicial remedy in school desegregation cases.

The Court of Appeals for the Sixth Circuit admittedly has not considered the substantive questions raised herein with respect to a so-called metropolitan plan of desegregation. These substantive questions are of such monumental constitutional significance and imperative public importance, however, as to warrant the immediate attention of this Court.

The disruptive consequences of a judicial remedy affecting nearly 1,000,000 children and calling for massive cross-district bussing between up to eighty-five (85) school districts is obvious and to delay final decision on the legal propriety of such remedy while the parties trod the traditional path of appeal will serve to exacerbate such disruptive consequences.

It is admittedly the duty of the District Court to effect a remedy which will prevent the impairment of the constitutional rights of children within the Detroit school system. Such remedy should put an end to *de jure* segregation, if it legally exists. The remedy, however, should not be expanded beyond what is necessary to repair the denial of the constitutional right to be protected. As stated in *Swann, supra:*

". . . . The task is to correct, by a balancing of the individual and collective interests, the condition that offends the constitution." *Swann, supra,* at page 16.

The interests of the 750,000 children who attend suburban school districts are of no less importance than the interests of plaintiffs herein. The judicial guidance of this Court is needed now in the interests of all concerned.

CONCLUSION

This matter manifests the characteristics, in terms of public importance, of other cases [7] in which this Court has seen fit to exercise its authority to issue a writ of certiorari, even in the absence of decision by the Court of Appeals. Massive bussing orders to achieve school desegregation, none of which approach the magnitude of the remedy here involved, and the public confusion associated therewith have prompted calls for definitive guidance by the President of the United States, the United States Congress and the public generally. So nebulous is the appropriate scope of judicial remedy in school desegregation cases that a substantial portion of the public, legislative and executive officials have urged the adoption of a constitutional amendment to circumscribe the remedial powers of the courts.

The substantial number of school desegregation cases now pending in District Courts and Courts of Appeals throughout the United States would be expedited by the prompt resolution of the constitutional issues in the instant case.

The circumstances recited herein and in the Petition For Writ Of Certiorari demonstrate the compelling reasons why this Court should grant certiorari.

[7]
United States v *Bankers Trust Co.*, 294 US 240; *Railroad Retirement Board* v *Alton R. Co.*, 295 US 330; *Rickert Rice Mills* v *Fontenot*, 297 US 110; *Carter* v *Carter Coal Co.*, 298 US 238; *Ex parte Quirin*, 317 US 1; *United States* v *United Mine Workers*, 330 US 258; *Youngstown Co.* v *Sawyer*, 343 US 579.

It is respectfully prayed that the Petition For Writ Of Certiorari to the United States Court of Appeals be granted by this Honorable Court to the end that this cause may be timely reviewed and determined by this Court.

Respectfully submitted,

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